THE WIFE'S INTEREST IN THE COMMUNITY AS A VESTED RIGHT.—Since by the common law no co-ownership resulted from marriage,[1] the relative rights of the husband and wife during coverture, under the community system which exists in a number of the United States, are not affected by common law precedents, but must be determined by an examination of the Code Napoleon and the Spanish and Mexican law,[2] from which the institution, in its statutory form, was principally derived.[3] The various codifications of the community States are so closely modeled on this law as it existed under the French, Spanish and Mexican dominions[4] that the most important variations seem to be either limitations on the power of the husband as agent of the community, made with the purpose of affording better protection to the wife's interest, or regulations of dissolution and inheritance.[5] A substantial similarity, however, existed between the codes on this subject. All property acquired during the marriage by "onerous" title or jointly by "lucrative" title belonged to the community,[6] a creature of the statute *sui generis,* and on its dissolution was divided equally between the parties or their heirs, subject to the common debts.[7] In the case of a separation caused by the adultery of one party, however, all acquêts and gains fell to the innocent party.[8] The foundation for the system seems to have been the idea of a just recognition of the wife's services, on the ground that she contributed equally with the husband to the acquisition of the property, and secondarily the belief that both would thus be stimulated to labor and care in behalf of one another.[9] The relation has often been loosely termed a partnership, but the inaptness of this expression is apparent.[10] The husband was the manager and in the absence of fraud or express legislative restriction was authorized to deal with the community acquêts and gains in all respects as if he were the owner thereof.[11]

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[1]See Freeman, Cotenancy and Partnership, (2nd ed.) § 121.

[2]See Meyer *v.* Kinzer (1859) 12 Cal. 247. Other community systems have had slight influence only.

[3]See 3 Ballard, Digest of Real Property, § 70.

[4]See Bruneau *v.* Bruneau's Ex'r (La. 1821) 9 Martin 217; Spreckels *v.* Spreckels (1897) 116 Cal. 339; Strong *v.* Eakin (1901) 11 N. M. 107; Brotton *v.* Langert (1890) 1 Wash. 73; Warburton *v.* White (1899) 176 U. S. 484.

[5]See Reade *v.* de Lea (1908) 14 N. M. 44, reversed by Arnett *v.* Reade (1911) 31 Sup. Ct. 426. For a comparison of the statutes on the subject see Ballinger, Community Property, Appendix.

[6]Property acquired by lucrative title included that received by gift, devise, bequest, or inheritance. All else was acquired by onerous title. See Freeman, Cotenancy and Partnership, (2nd ed.) § 133; Schmidt, Civil Law of Spain and Mexico, Arts. 44, 46; Platt, Right of Married Women, § 7; Noe *v.* Card (1860) 14 Cal. 577, 597; Davis *v.* Compton (1858) 13 La. Ann. 396.

[7]Thompson *v.* Cragg (1859) 24 Tex. 582, 598.

[8]Garrozi *v.* Dastas (1907) 204 U. S. 64.

[9]See Meyer *v.* Kinzer *supra;* 1 La Serna, Derecho Civil Y Penal España 384.

[10]See 3 Ballard, Digest of Real Property, §§ 70, 78. While the husband was personally liable for community debts, the wife was not. See Succession of Cason (1880) 32 La. Ann. 790.

[11]See 3 Ballard, Digest of Real Property, § 75; Schmidt, Civil Law of Spain and Mexico, Arts. 51, 52, 54; Ray *v.* Ray (1874) 1 Ida. 566.

Largely, it would appear, because of this complete control of the husband, the courts have frequently been led to doubt the reality of the wife's interest in the common property during the continuance of the marriage relation.[12] Thus, it is pointed out, suits affecting common interests must be brought in the name of the former; and the wife is not a party.[13] Again, if common property be stolen, the indictment alleges that he is the owner,[14] and it seems that the wife's consent cannot be pleaded by the thief;[15] and furthermore, it is urged, the common property is liable to seizure for the debts of the husband contracted before marriage.[16] Having considered the foregoing indications of the fullness of the husband's power, these courts then proceed to demolish what they apparently regard as the most forceful argument for a present interest in the wife, her power to attack a fraudulent conveyance made by the husband.[17] Finally, by means of the much abused common law reasoning that an unenforceable right is no right at all, they conclude that the husband's absolute power of management vests him with actual ownership, and that the wife's interest is fictitious—"a mere expectancy," in the often quoted words of Justice Field.[18] Manifestly, however, the presence of the wife could not be required as a party in suits affecting the common possessions, nor could her acquiescence in the supposed case of larceny be permitted to shield the thief, without endowing her with a share of the husband's power of management. Furthermore, the fact that the community is liable equally for the wife's antenuptial debts destroys the supposed force of the argument that it is liable for the husband's.[19] Her rights, however, are not proved merely by negative reasoning; and when common law conceptions are thrust aside, many evidences of the substantiality of her interest appear. For example, in several jurisdictions the wife's consent is now essential to an alienation of real estate;[20] while in one State, the community is liable only for community obligations.[21] Again the wife's half seems to have been subject to confiscation without affecting that of the husband,[22] while the community is always liable for her support. On the husband's insanity, imprisonment, or abandonment of the wife, control seems

[12]See Guice *v.* Lawrence (1847) 2 La. Ann. 226; Moreau *v.* Delchemendy (1853) 18 Mo. 522; Spreckels *v.* Spreckels *supra.*

[13]See Reade *v.* de Lea *supra;* Spreckels *v.* Spreckels *supra.*

[14]State *v.* Gafferty (1887) 2 La. Ann. 265.

[15]See People *v.* Swalm (1889) 80 Cal. 46.

[16]Davis *v.* Compton *supra.*

[17]Obviously, by many analogies the fact that the wife is entitled to protection against fraud presupposes in her no vested right; see 24 Harv. L. Rev. 653; and whether the wife can during coverture bring her action against the husband seems debatable. See Greiner *v.* Greiner (1881) 58 Cal. 115.

[18]See Van Maren *v.* Johnson (1860) 15 Cal. 308.

[19]Van Maren *v.* Johnson *supra.*

[20]See Spreckels *v.* Spreckels *supra;* Reade *v.* de Lea *supra;* Brotton *v.* Langert *supra.* These statutes have not altered the relative rights of the spouses as they previously existed. Warburton *v.* White *supra;* Arnett *v.* Reade *supra.*

[21]Brotton *v.* Langert *supra;* see Milne *v.* Kane (Wash. 1911) 116 Pac. 659.

[22]See Reade *v.* de Lea *supra* (dissenting opinion).

to pass to her.[23] Manifestly both where the wife is accorded the right of testamentary disposition,[24] and where her successors are deemed heirs,[25] her interest must be a vested one subject to defeat by the other spouse. Her devisees or heirs can take no more than she possesses.

In the late case of *Mazzei* v. *Gruis et al.* (La. 1911) 55 So. 555, the court adhered to this test and held that on the death of the wife an undivided half interest vested immediately in her heirs subject under a statute to the usufruct of the husband, thus again recognizing the doctrine here contended for.[26] As stated by Justice White, "It is a misconception * * * to suppose that because power was vested in the husband to dispose of the community acquired during marriage, as if it were his own, therefore by law the community property belonged solely to the husband."[27] The objection that the wife has no interest in the acquisitions and gains until the marriage is dissolved confounds the power of the husband to defeat the right, with its existence.[28] The mind steeped in the common law should not lose sight of the fact that the community is a creature of law *sui generis*, and that management and disposal are given the husband, not on the ground of any greater interest, but merely for supposed reasons of public policy and social economy.[29]

POWERS OF A COURT TO EFFECTUATE THE INTENTION OF A TESTATOR.—It is axiomatic that the intention of a testator is the soundest basis for the judicial construction of a will, and it is equally clear that this

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[23]No case has been found which decided that the entire control passed to the wife; but on the other hand it is difficult to conceive of a case where such a broad holding would be necessary to the decision. Zimpleman *v.* Robb (1880) 53 Tex. 274; Slater *v.* Neal (1885) 64 Tex. 222; Forbes *v.* Moor (1869) 32 Tex. 195; See Hall *v.* Johns (1909) 17 Ida. 224.

[24]Brown *v.* Pridgen (1882) 56 Tex. 124.

[25]See Reade *v.* de Lea *supra* (dissenting opinion); Glasscock *v.* Clark (1881) 33 La. Ann. 584; Tugwell *v.* Tugwell (1880) 32 La. Ann. 848.

[26]This view is also taken in Arizona, New Mexico and Washington, see note to *In re* Ingram 12 Am. St. Rep. 80, 90, and was announced in early Texas cases. Clark *v.* Nolan (1873) 38 Tex. 416. The Texas courts now, however, though holding the beneficial interests of the spouses equal, declare the legal title to be in the husband; Edwards *v.* Brown (1887) 68 Tex. 329; Patty *v.* Middleton (1891) 82 Tex. 586; while in California and Idaho the courts, apparently misled by false common law analogies, by a failure to see live indications of the wife's interest and possibly by a confusion of community systems, hold that the wife's interest during coverture is the expectancy of an heir. Van Maren *v.* Johnson *supra;* Estate of Moffitt (1908) 153 Cal. 359; Hall *v.* Johns *supra.* It is suggested that translation of community terms may have caused confusion also. See Reade *v.* de Lea *supra* (dissenting opinion). By the French law prior to the Napoleon Code, indeed, the wife's right was apparently regarded lightly, but the Code Napoleon and the Spanish law before the Spanish Code recognized that she had a substantial right. See Garrozi *v.* Dastas *supra; cf.* Thompson *v.* Cragg *supra.*

[27]Warburton *v.* White *supra* 497.

[28]Dixon *v.* Dixon's Ex'r (1832) 4 La. 188; Wright *v.* Hays (1853) 10 Tex. 130.

[29]See Warburton *v.* White *supra;* Taylor *v.* Murphy (1878) 50 Tex. 291, 301; Smith *v.* Smith (1859) 12 Cal. 217; Garrozi *v.* Dastas *supra.*